



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 22, 1995

Ms. Helen L. Campbell
Commissioner
Fire Fighters' Pension Commission
3910 South IH-35, Suite 235
Austin, Texas 78704

Letter Opinion No. 95-089

Re: Whether the board of trustees of a retirement system governed by V.T.C.S. article 6243e is authorized to exclude a car allowance paid to a fire fighter from his or her "compensation" for purposes of calculating contributions and benefits (ID# 33092)

Dear Commissioner Campbell:

On behalf of the Lubbock Firemen's Relief and Retirement Fund (the "retirement system"), you ask about the definition of compensation under article 6243e, V.T.C.S. You explain that the City of Lubbock (the "city") Fire Department (the "fire department") pays certain fire fighters a car allowance. You indicate that these car allowances are currently treated as compensation by the retirement system, and are included in the calculation of the city's and fire fighters' contributions to the retirement system as well as the calculation of members' benefits.¹ The board of trustees of the retirement system (the "board") would like to amend its plan to exclude car allowances from the definition of compensation for purposes of its plan. You ask whether article 6243e permits the board to do so.

Article 6243e, section 7 sets forth the authority of the board of trustees of a retirement system to modify benefits:

(a) The board of trustees of a retirement system may change the benefits or eligibility requirements for benefits payable from the retirement system . . . and may adopt or change other requirements for the payment of benefits, except as otherwise prohibited by this Act.

¹The Lubbock Firemen's Relief and Retirement Fund Plan, effective December 20, 1993, requires a fire fighter and the city to make contributions based on a percentage of his or her "total pay," which is described as "including regular, longevity, and overtime pay and pay received during a period of sick leave or vacation, and excluding lump sum distributions for unused sick leave or vacation." Lubbock Firemen's Relief and Retirement Fund Plan Effective: December 20, 1993, at 19. Benefits are based in part upon compensation "including regular, longevity and overtime pay and excluding lump sum distributions for unused sick leave or vacation." *Id.*

(b) Before a board of trustees chooses to adopt or change a benefit or requirement for payment of benefits under this section, the proposed addition or change must be approved by:

- (1) an eligible actuary selected by the board; and
- (2) a majority of the participating members of the retirement system voting on the addition or change by secret ballot at an election held for that purpose at which at least 50 percent of all participating members of the retirement system vote.

....

(d) Except as provided by Subsection (e) of this section, if a board chooses to adopt an addition or change after it has been approved as provided by this section, the addition or change applies to all persons who are participating members of the retirement system on the effective date of the addition or change and all persons who became participating members during the time the addition or change remains in effect. The addition or change also may apply to:

- (1) persons receiving monthly benefits; or
- (2) former members of the fire department who meet an applicable length-of-service requirement for service retirement.

(e) An addition or change adopted under this section may not, without the member's written consent, deprive a member of the retirement system of a right to receive a vested benefit.

In addition, section 12(c), which sets forth minimum retirement benefits, provides:

A board of trustees established under this Act may, in accordance with Section 7 of this Act:

- (1) decrease the age or service requirements for service retirement from a particular retirement system; or
- (2) determine formulas for computing benefits, classes of permissible beneficiaries, and other requirements for payment of service retirement benefits, as long as the minimum benefits payable to a retiree are not less than the amounts provided by Subsection (b) of this section.

V.T.C.S. art. 6243e, § 12(c).

Members' and the city's contributions to the retirement system are governed by section 29 of article 6243e. A member's contribution "is computed on the employee's periodic compensation at a rate determined by majority vote of the employees of the

department.” *Id.* § 29(a). The city’s contributions “are computed on the total compensation paid to the employees who are participating members of the system.” *Id.* § 29(b). Section 2(9) of article 6243e defines the term “compensation” as follows: “‘Compensation’ includes amounts of workers’ compensation benefits received by an employee and by which the employee’s salary is reduced.”

As you point out, the definition of “compensation” in section 2(9) is vague. Clearly, under section 2(9), compensation is something broader than “salary,” but beyond that, it is undefined except to specifically include workers’ compensation benefits. Section 29, which governs the city’s and members’ contributions to the retirement system, also uses the term “compensation” but fails to define it any more concretely. In addition, section 12, which governs retirement benefits, makes no mention of the term. A board of trustees of a firemen’s relief and retirement fund is in the nature of a public administrative body. *Herschbach v. City of Corpus Christi*, 883 S.W.2d 720 (Tex. App.—Corpus Christi 1994, writ denied); Attorney General Opinion JM-926 (1988). In the absence of a clear definition of the term “compensation” in article 6243e or in a rule adopted by the fire fighters’ pension commissioner pursuant to section 21(f)² of that article, we believe that the courts would uphold a reasonable definition of the term adopted by an individual retirement system in carrying out its administrative duties. Gov’t Code § 311.023(6); *Dodd v. Meno*, 870 S.W.2d 4, 7 (Tex. 1994); *Texans to Save the Capitol, Inc. v. Board of Adjustment*, 647 S.W.2d 773, 776 (Tex. App.—Austin 1983, writ ref’d n.r.e.). Such definition must include “amounts of workers’ compensation benefits received by an employee and by which the employee’s salary is reduced,” as specifically required by section 2(9).

In addition, we can provide some guidance on your specific question about compensation: that is, whether or not a car allowance is “compensation” for purposes of the retirement program. “Compensation” for services and “expense reimbursements” are distinguishable. Attorney General Opinion JM-39 (1983); *see also* Attorney General Opinion JM-195 (1984). A car allowance may be compensation or a reimbursement for expenses, depending on whether the governmental body provides it to benefit the employee or to carry out a purpose of its own, even though some benefit may incidentally accrue to the individual. *See* Attorney General Opinions JM-968 (1988), JM-148 (1984), H-74 (1973). Thus, a car allowance may be excluded from compensation if the governmental body provides it to carry out a purpose of its own as opposed to purely as a benefit to the employee.

²Section 21(f) of article 6243e provides as follows: “The fire fighters’ pension commissioner shall hear appeals as provided by this Act and may examine the records and accounts of boards of trustees established under this Act and adopt rules and prescribe forms for the administration of this Act.” We do not address here whether this provision authorizes the commissioner to adopt rules defining compensation.

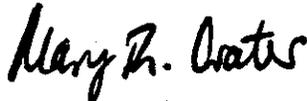
You ask whether article 6243e restricts the retirement system to defining "compensation" as it is defined by the fire department. We see nothing in article 6243e suggesting that a retirement system is so limited.

You also ask whether the fire fighters who have received contributions and/or benefits based on a car allowance have a right to continue receiving them as a vested benefit. As you point out, an addition or change to a plan adopted under section 7 may not "deprive a member of the retirement system of a right to receive a vested benefit." V.T.C.S. art. 6243, § 7(e). Whether a benefit has vested appears to be governed by each retirement system's individual plan. In addition, whether a member would be deprived of a benefit that has vested involves questions of fact, such as the member's number of years of service. You have not provided us with any information which would permit us to determine whether a particular member of any specific plan is entitled to receive contributions and/or benefits based on a car allowance as a vested benefit.

S U M M A R Y

In the absence of a clear definition of the term "compensation" in article 6243e, or in a rule adopted by the fire fighters' pension commissioner pursuant to article 6243e, section 21(f), each individual retirement system established under article 6243e may adopt a reasonable definition of the term to carry out its administrative duties. Such definition must include "amounts of workers' compensation benefits received by an employee and by which the employee's salary is reduced," as specifically required by article 6243e, section 2(9).

Yours very truly,



Mary R. Crouter
Assistant Attorney General
Opinion Committee